Public Prosecutor v Hon Jin Bong & Anor

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 42-4 OF 1997
SULONG J
5 DECEMBER 1998

Trade Marks — *Trade description — False trade description — Forfeiture of machines — Respondents pleaded guilty to using false trade description — Whether forfeiture of machines mandatory under s 32(2) of the Trade Descriptions Act 1972 — Whether machines were the subject matter of, or were used in the commission of the offence*

Criminal Procedure — *Plea of guilty — Statement of facts — Whether accused only bound by what he had agreed to in statement of facts — Whether circumstantial evidence and inferences may be made*

The respondents had pleaded guilty to using a false mark, ie 'Made in Japan' on 250,000 units of Snowman Marker pens. They were fined and the markers and other exhibits were forfeited except six units of machines. The Public Prosecutor appealed, contending that an order of forfeiture is mandatory under s 32(2) of the Trade Descriptions Act 1972 if it is proved to the satisfaction of the court that an offence had been committed, and that the goods were the subject matter of, or were used in the commission of, the offence. It was stated in the agreed statement of facts that the markers were found together with the machines in a factory producing marker pens. Although it was not stated that the machines were used in the commission of the offence, the Deputy Public Prosecutor argued that that was the only reasonable inference that could be drawn, and furthermore, the respondents had not denied that the machines were used to manufacture the markers. The respondents argued that the prosecution must prove beyond reasonable doubt that the machines were used in the commission of the offence.

Held, dismissing the appeal:

(1) The notes of evidence showed that the respondents were found guilty and convicted on the strength of their plea and their admission to the statement of facts. Therefore, the court has to see if there was anything in the statement of facts to suggest that the six machines were used in the commission of the crime (see p 381D–F).

(2) It was never shown to the court that the offending words 'Made in Japan' were embossed or printed onto the Snowman Marker using the six machines (see p 382D).

(3) Where there is a statement of the facts agreed to by the accused and his conviction was founded on the statement, he is only bound by what he has agreed to, ie within the confines of 'the four corners' of the statement of facts (see p 382E).

(4) The Deputy Public Prosecutor's argument that inference and circumstantial evidence be used against the respondent could not be accepted because: (i) circumstantial evidence has no application in a case where there is an admission to the statement of facts; and further, there was no trial in the lower court; and (ii) where there is more than one inference which can be reasonably drawn from a set of facts in a criminal case, the inference most favourable to the accused should be adopted (see pp 381H–I and 382B–C); *Tai Chai Keh v PP* [1948–49] MLJ Supp 105 followed.

(5) It had not been proven to the satisfaction of the court that the machines were used in the commission of the offence. The sessions court judge had considered the matter and made a finding on the facts when she ordered the return of the machines to the respondent. There was no basis to interfere with the judge's decision as she had not erred in principle in any way (see p 383G–I); *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, *PP v Wan Razali Kassim* [1970] 2 MLJ 79 and *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 followed.

[**Bahasa Malaysia summary**

Penentang-penentang telah mengaku salah kerana menggunakan tanda palsu, iaitu 'Made in Japan' pada 250,000 unit pen Penanda Snowman. Mereka telah didenda dan penanda-penanda serta ekshibit-ekshibit lain telah dirampas kecuali enam unit mesin. Pendakwa Raya merayu, dengan berhujah bahawa satu perintah perlucuthakan adalah mandatori di bawah s 32(2) Akta Perihal Dagangan 1972 sekiranya ia dibuktikan hingga mahkamah berpuas hati bahawa satu kesalahan telah dilakukan, dan bahawa barangan tersebut adalah perkara subjek, atau telah digunakan dalam melakukan kesalahan tersebut. Ia dinyatakan dalam pernyataan fakta yang disetujui bahawa penanda-penanda telah dijumpai bersama dengan mesin tersebut di sebuah kilang yang mengeluarkan pen penanda. Walaupun ia tidak dinyatakan bahawa mesin tersebut digunakan dalam melakukan kesalahan tersebut, Timbalan Pendakwa Raya menghujahkan bahawa ia merupakan satu-satunya inferens munasabah yang boleh dibuat, dan tambahan pula, penentang-penentang telah tidak menafikan bahawa mesin tersebut telah digunakan untuk mengilang penanda tersebut. Penentang-penentang berhujah bahawa pihak pendakwaan mestilah membuktikan melampaui keraguan munasabah bahawa mesin tersebut telah digunakan dalam melakukan kesalahan tersebut.

Diputuskan, menolak rayuan:

(1) Nota-nota keterangan menunjukkan bahawa penentang-penentang didapati bersalah dan disabitkan atas kekukuhan

hujah mereka dan pengakuan mereka kepada pernyataan fakta-fakta. Maka, mahkamah hendaklah melihat sama ada terdapat apa-apa dalam pernyataan fakta bagi mencadangkan bahawa enam mesin tersebut telah digunakan dalam melakukan kesalahan (lihat ms 381D–F).

(2) Ia tidak pernah ditunjukkan di mahkamah bahawa perkataan-perkataan 'Made in Japan' telah dicetak timbul atau diterbitkan pada Penanda Snowman dengan menggunakan enam mesin tersebut (lihat ms 382D).

(3) Di mana terdapat pernyataan tentang fakta-fakta yang disetujui oleh tertuduh dan sabitannya adalah berasaskan pernyataan tersebut, ia hanya terikat oleh apa yang telah dipersetujuinya, iaitu dalam rangkuman 'empat penjuru' pernyataan fakta tersebut (lihat ms 382E).

(4) Hujah Timbalan Pendakwa Raya bahawa inferens dan keterangan ikut keadaan boleh digunakan terhadap penentang tidak boleh diterima kerana: (i) keterangan ikut keadaan tidak terpakai dalam kes di mana terdapat pengakuan kepada pernyataan fakta; dan seterusnya, tiada perbicaraan di mahkamah rendah; dan (ii) di mana terdapat lebih daripada satu inferens yang boleh dibuat secara munasabah daripada suatu set fakta dalam kes jenayah, inferens yang paling memihak kepada tertuduh haruslah diterimapakai (lihat ms 381H–I dan 382B–C); *Tai Chai Keh v PP* [1948–49] MLJ Supp 105 diikut.

(5) Ia tidak dibuktikan hingga mahkamah berpuas hati bahawa mesin tersebut telah digunakan dalam melakukan kesalahan tersebut. Hakim mahkamah sesyen telah menimbang hal tersebut dan membuat keputusan atas fakta-fakta apabila beliau memerintahkan mesin tersebut dikembalikan kepada penentang. Tiada dasar wujud untuk mengganggu keputusan hakim kerana beliau telah tidak terkhilaf dari segi prinsip dalam apa-apa cara pun (lihat ms 383G–I); *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, *PP v Wan Razali Kassim* [1970] 2 MLJ 79 dan *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 diikut.]

Notes

For cases on statement of facts where the accused plead guilty, see 8 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1803–1808.

For cases on false trade description, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1285–1293.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (folld)
Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor [1942] 1 All ER 142 (refd)
Eng Song Hai v PP [1954] MLJ 38 (refd)
Heng Kim Khoon v PP [1972] 1 MLJ 30 (refd)
Kartar Singh v Rex [1952] MLJ 85 (refd)
Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru [1981] 2 MLJ 249 (refd)
Ng Song Luak v PP [1985] 1 MLJ 456 (refd)
PP v Ismail bin Yusof [1979] 2 MLJ 119 (refd)
PP v Kedah & Perlis Ferry Service Sdn Bhd [1978] 2 MLJ 221 (refd)
PP v Lau Siew Ngoung & Anor [1994] 2 MLJ 91 (refd)
PP v Lee Wye Kheng [1978] 1 MLJ 38 (refd)
PP v Mat Nawi bin Ismail [1987] 2 MLJ 366 (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79 (folld)
R v Ng Hee Weng & Ors [1955] MLJ 85 (refd)
R v Wong Ki Chin [1995] MLJ 39 (refd)
Tai Chai Keh v PP [1948–49] MLJ Supp 105 (folld)
Tan Khing Hung v PP [1996] 4 MLJ 316 (refd)
Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175 (folld)
Yap Yoon Lin v R [1954] MLJ 59 (refd)

Legislation referred to

Criminal Procedure Code ss 305, 325(1)
Criminal Procedure Code (Straits Settlements) s 427(1)
Customs Act 1967 s 127(1)
Dangerous Drugs Ordinance 1952 ss 9(1)(b),(c), 10(2)(a)
Fisheries Act 1985 s 15(1)(b)
Trade Descriptions Act 1972 ss 3(1)(a), 18(1), 32(1), (2)

RK Menon (*RK Menon & Co*) for the respondent.
Teo Say Eng (*Deputy Public Prosecutor*) of the appellant.

Sulong J:

Facts

The respondents were charged under s 3(1)(a) of the Trade Descriptions Act 1972 and punishable under s 18(1) of the same Act.

The statement of facts of the case was tendered and both respondents admitted the facts and pleaded guilty and were fined RM10,000 each. Several exhibits tendered were forfeited and these included 250,000 units of Snowman Markers of assorted colours, 1000 units 'Kotak Pembungkus', 30 units 'Ink Percetakan pelbagai warna', 10 units 'bahan mentah jenama Polypropylene'. The machines were however ordered to be returned to the respondents.

Forfeiture of goods seized is governed by s 32 of the Trade Descriptions Act. The respondents argued that the statement of facts failed to show that the machines were the subject matter of, or were used in the commission of the offence.

This appeal is against the non-forfeiture of the machines by the learned sessions court judge at Johor Bahru.

The charge against the respondents was as follows:

> Bahwa kamu bersama-sama pada 23 April 1997 lebih kurang jam 5.35 petang di premis Tripleplas Industry Sdn Bhd, No 18 Jalan Bayu 2/3, Taman Industrian Tampoi Jaya dalam daerah Johor Bahru di dalam Negeri Johor Darul Takzim dalam perjalanan perdagangan telah didapati menggunakan suatu perihal dagangan palsu iaitu 'Made in Japan' ke atas 'Snowman Marker' pelbagai warna sebanyak 250,000 unit walhal ianya tidak dikilangkan di negara Jepun dan dengan itu telah melakukan kesalahan di bawah s 3(1)(a) Akta Perihal Dagangan 1972 dan boleh dihukum di bawah s 18(1) Akta yang sama.

Both pleaded guilty and were convicted.

The statement of facts (P1) in respect of this case was tendered to court and it is reproduced hereunder :

> PP lwn (i) Ho Jin Bong (K/P No S2112638A)
> (ii) Chen Meng Min (K/P No S0117711G)
>
> Kes tangkapan No :.....
>
> *Fakta kes:*
>
> Pengadu di dalam kes ini ialah PPP Jagjeer Singh a/l Gurucharan Singh — Penolong Pengawal Perihal Dagangan yang bertugas di bahagian Penguatkuasa, Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna.
>
> 2 Pada 23 April 1997, lebih kurang jam pukul 5.35 petang, pengadu telah mengetuai sepasukan pegawai penguatkuasa membuat pemeriksaan di premis Tripleplas Industry Sdn Bhd No 18, Jalan Bayu 2/3, Taman Industrian Tampoi Jaya, 81200 Johor Bahru.
>
> 3 Setibanya di premis tersebut pengadu telah berjumpa dengan dua orang lelaki cina yang bernama Ho Jin Bong No K/P S2112638A dan Chen Meng Min No K/P S0117711G yang mengaku sebagai tuanpunya perniagaan tersebut. Pengadu telah memperkenalkan diri dan menjelaskan maksud kedatangannya. Premis tersebut adalah merupakan sebuah kilang membuat pelbagai jenis marker pen.
>
> 4 Di dalam pemeriksaan yang dijalankan, telah mendapati bahawa premis tersebut telah menggunakan suatu perihal dagangan palsu iaitu 'Made in Japan' ke atas 250,000 unit marker pen jenama Snowman Marker yang terdiri dari pelbagai warna. Pengadu telah menjelaskan kesalahan yang dilakukan kepada kedua-dua defendan tersebut.
>
> 5 Tindakan telah diambil dengan menyita kesemua 250,000 unit marker pen tersebut beserta dengan:
>
> (a) Cotastar (Heat transfer Machine) model HTS-300 — 1 unit.
>
> (b) Filling Machine — 1 unit.

A (c) Striping Machine Model ES 104 — 1 unit.
(d) Infrared Ray Shrink Tunner — 1 unit.
(e) Injection Machine Model CN 180 A-11 — 1 unit.
(f) Injection Machine Model VN 75 — 1 unit.
(g) Kotak pembungkus — 1,000 unit.
B (h) Ink percetakan pelbagai warna — 30 unit.
(i) Bahan mentah jenama Polypropylene @ 25kg — 10 unit.

6 Suatu akuan rampasan telah dikeluarkan dan ditandatangani oleh Chen Meng Min No K/P S0117711G

C 7 Oleh yang demikian kedua-dua defendan telah melakukan kesalahan di bawah s 3(1)(a) Akta Perihal Dagangan 1972 seperti dipertuduhan.

Barang-barang kes:

(1) Fakta kes — P1
(2) Akuan Rampasan — P2
D (3) Marker Snowman pelbagai warna sebanyak 250,000 unit — P3
(4) Cotastar (Heat transfer Machine) Model HST-300 — 1 unit — P3(a)
(5) Filling machine — 1 unit — P3(b)
(6) Striping Machine Model ES 104 — 1 unit — P3(c)
(7) Infrared Ray Shrink Tunner — 1 unit — P3(d)
E (8) Injection Machine Model CN 180 A11 — 1 unit — P3(e)
(9) Injection Machine Model VN 75 — 1 unit — P3(f)
(10) Kotak pembungkus — 1,000 unit — P4(A)
(11) Ink percetakan pelbagai warna — 30 unit — P4(B)
(12) Bahan mentah jenama Polypropylene @ 25kg — 10 unit — P4(C)
F (13) Gambar-gambar di tempat kejadian beserta negetif sebanyak 25 keping — P5(a)–P5(y)
(14) Sijil Sah Pendaftaran syarikat —P6

Tandatangan
G (Jamil bin Buang)
Pegawai Pendakwa

The learned Session Court judge, Johor Bahru imposed a fine of RM10,000 on each of the respondents in default 3 months imprisonment and ordered the forfeiture of exhs P3 and P4 and further ordered that the machines (exhs P3(a)–(f)) be returned to the respondents.

H The Public Prosecutor, being dissatisfied appealed against the decision on the following grounds:

(i) terdapat keterangan yang mencukupi untuk membuktikan atau untuk membuat inference bahwa exh P3(a)–(f) adalah mesin-mesin untuk membuat marker pen yang menggunakan perihal dagangan palsu; dan
I (ii) mitigation responden-responden mengesahkan bahawa pen marker yang menggunakan perihal dagangan palsu dibuat di premis respondan dengan menggunakan machinery dalam premis tersebut.

Appellant's case:

The learned DPP Mr Teo Say Eng, argued forcefully and eloquently for the forfeiture of the six units of machines. His contention was that the order of forfeiture under s 32(2) of the Trade Descriptions Act 1972 ('TDA') is mandatory if it is proved to the satisfaction of the court that an offence has been committed, and that the goods were the subject matter of, or were used in the commission of the offence. He went on to outline to the court the relevant s 32(2) of the TDA, which reads as follows:

> Forfeiture of Goods
>
> (1) All goods seized in exercise of any power conferred under this Act shall be liable to forfeiture.
>
> (2) An order for the forfeiture or for the release of any goods seized in exercise of any power conferred under this Act shall be made by the Court before which the prosecution with regard thereto has been held and an order for the forfeiture of the goods shall be made if it is proved to the satisfaction of the Court that an offence under this Act has been committed and that the goods were the subject matter of or were used in the commission of the offence notwithstanding that no person may have been convicted of such offence.

The learned DPP argued that there are sufficient facts in this case to show the six machines were used in the commission of the offence.

It was however graciously conceded by the learned DPP that the statement of facts (P1) did not state directly that the machines were used in the commission of the offence. But he argued that there could only be one reasonable inference to be drawn therefrom, ie the machines were used in the commission of the offence. To back his argument para 3 of P1 (15 of the appeal record) was read out to the court. It reads:

> Setibanya di premis tersebut aduan telah berjumpa dengan dua orang lelaki cina bernama Ho Jin Bong No K/P S2112638A dan Chen Meng Min No K/P S0117711G yang mengaku sebagai tuan punya perniagaan tersebut. Aduan telah memperkenalkan diri dan menjelaskan maksud kedatangannya. *Premis tersebut adalah merupakan sebuah kilang membuat pelbagai jenis marker pen.* (Emphasis added.)

It was submitted by the learned DPP that two things could be deduced therefrom:

(1) that the respondents admitted that they were the owners of the business;

(2) that the said premises was used to produce various types of marker pens.

The picture at p 20 of appeal record shows boxes marked 'Snowman Marker'. It was the submission of the learned DPP that the premise (the respondent) had applied a false trade mark, ie 'Made in Japan' on 250,000 units of 'Snowman Marker' of assorted colours marked P3 at p 16 of the appeal record.

A These were found in the factory where the machines were housed together with some other items listed at p 16 of the appeal record, ie P3 (a–f); P4(A), P4(B), P4(C).

Further, it was argued that para 4 of p 15 of the appeal record says as follows:

B > Dalam pemeriksaan yang dijalankan pengadu-pengadu telah mendapati bahawa premis tersebut telah menggunakan suatu perihal dagangan palsu iaitu 'Made in Japan' keatas 250,000 unit marker pen jenama Snowman Marker yang terdiri dari pelbagai warna. Pengadu telah menjelaskan kesalahan yang dilakukan kepada kedua-dua defendan tersebut.

C If the court is satisfied that the only reasonable inference drawn from the statement of fact was that those items under P3(a)–P3(f) were used in the manufacture of the infringing articles (P3), then this court was urged to set aside the order of the court below and substitute it with an order of forfeiture. This, according to the learned DPP was based on circumstantial evidence and offered the case of *Kartar Singh & Anor v Rex* [1952] MLJ 85 D as authority where Murray-Aynsley CJ (Court of Criminal Appeal) said at p 86 that: 'Where there is direct evidence, however slight, the jury are entitled to accept it and the case should be left to them to decide. In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all.

E It was the contention of the appellant that the facts found in P1 point to one reasonable conclusion that the said machines were used in the commission of the said offence. The factory was used to manufacture assorted Snowman Marker. The infringing articles bearing the name 'Snowman Marker' were found with the same machines in the factory; in F substantial quantity. Any reasonable man would have come to this conclusion.

It was further submitted that in a case where the accused pleads guilty to a charge, the facts of the case should not be confined to the written facts alone but should include any other facts stated in the notes of proceedings up to the time that the order of forfeiture was given. See *Eng Song Hai v PP* G [1954] MLJ 38 where Bellamy J (ACr J) said as (at pp 38–39): 'The appellant had pleaded guilty to the charge as amended, and no question then arose of the prosecution proving their case.'

The issue in the case of *Eng Song Hai v PP* was that the chemist report produced was not served 10 clear days before the trial under the provision H of the then s 427(1) of the Criminal Procedure Code of the Straits Settlements. On appeal, it was argued that failure to do so was fatal to the prosecution case. To this the court disagreed.

It should be noted however in this case that after his arrest on 6 October 1953, the appellant was produced before the sessions court on 8 October. The charge was read and explained to him ex abundanti cautela, no plea I was taken, the case being postponed to 26 October, to give the prosecution an opportunity of getting the articles found in the possession of the

appellant analysed by a government chemist and of delivering a copy of the chemist's report to the appellant as required by the section of the Criminal Procedure Code. In the meantime, there was a change of president of the sessions court. On 26 October 1953, on the application of the prosecuting officer the original charge against the appellant *was amended to conform* with the report of the chemist and the appellant was charged with the charge as amended. To this charge he pleaded guilty. The president thereupon convicted and sentenced the appellant. On appeal, it was held that as the appellant had pleaded guilty, there was no question of the prosecution proving their case and therefore it was not necessary for the learned magistrate to have evidence that the provisions of s 427(1) of CPC had been complied with.

Another case adduced by the learned DPP to support his argument was *Heng Kim Khoon v PP* [1972] 1 MLJ 30 which was an appeal against sentence. The accused, having pleaded guilty to the two charges against him under ss 9(1)(b) and 10(2)(a) of the Dangerous Drugs Ordinance 1952, could not appeal against his conviction because of the provisions of s 305 of the Criminal Procedure Code ('CPC'). The accused asked the court to exercise its revisionary powers under s 325(1) of the CPC.

At the trial, the charges were read over to the accused, explained and understood by him. He pleaded guilty thereto. He admitted the facts but in mitigation stated that the exhibits were not his and that they had been left behind by a friend. In spite of what the accused said, the learned president found him guilty and convicted him on the two charges.

It was held:

(1) proof of 'possession' is the very essential ingredient of the offences under the Dangerous Drugs Ordinance 1952;

(2) a plea of guilty only amounts to an admission that the accused committed the acts alleged against him and not an admission of the guilt under a particular section of the Act. If he pleads guilty under an erroneous view of the law his conviction cannot stand. In such a case the plea of guilty does not avail because he cannot be said to have committed the offence in question in the eyes of the law;

(3) therefore, the appeal was allowed and the case sent back for retrial before another president.

The then Dangerous Drugs Ordinance 1952 reads as follow:

s 9(1)(b) — No person shall keep or have in his possession, custody or control; or

s 9(1)(c) — manufacture, sell or otherwise deal in any prepared opium.

s 10(2)(a) — If any person has in his possession any pipe or utensil for use in connection with the smoking of prepared opium, or any utensil used in the preparation of opium for smoking or consumption otherwise; he shall be guilty of an offence against this Act and shall be liable on

A conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Clearly in this case proof of possession is an extremely essential ingredient. Per Sharma J at p 31:

B

> ... A plea of guilty may be accepted by the court and the accused convicted on it but the court is not bound to accept a plea of guilty in all cases. The court must carefully consider whether the accused has fully understood the nature of the charge to which he pleads guilty. The accused is not to be taken at his word when he pleads guilty unless the plea is expressed in *unmistakable terms with full appreciation of the essential ingredients of the offence.* The rule of law is
> C applied with all the greater stringency when the offence charged is complicated or serious. (Emphasis added.)

The learned DPP argued forcefully that this case was an authority for the proposition that what an accused said in mitigation can be used to set aside the conviction. It was further submitted that if there was a full trial then the
D full facts must be used.

The learned DPP further submitted that in a case where the accused pleads guilty, the court can consider other facts apart from the agreed facts in determining whether the goods seized were used in the commission of the crime.

E Two reasons were adduced:

(1) the rules of evidence are not strictly applicable as long as the accused admits the facts; and

(2) based on *Heng Kim Khoon v PP*, what is said in mitigation can be taken into account.

F This court is however of the view that because of the need to prove possession and the necessity of the guilty plea to be expressed in unmistakable terms with full appreciation of the essential ingredients of the offence, the court then was only exercising its revisionary powers to order a retrial. It is the view of this court that if there is any irregularity which
G occasions failure of justice, the court will exercise its power of revision.

The appellant drew the attention of the court to p 8 of the appeal record which reads:

Orang Kena Tuduh (2):

H
— We do not want machines to be forfeited still under finance
— first offender.
— loss of P3 RM50,000 (finished goods)
— we produce a lot of other things.

Pendakwaraya:

I (1) Snowman — registered trade mark
— Semua enam mesin digunakan untuk buat pen-pen ini.
— Pohon bahan-bahan dan mesin-mesin yang disita dirampas.

It was submitted that from p 8 to p 11 of the appeal record the respondents did not deny at all that the machines were used in the manufacture of the marker. Hence what is not denied is deemed to be admitted. It was not denied, according to the appellant, that the machines were used for the manufacture of snowman marker. A

This court notes that the appellant also failed to respond to the assertion of the respondents that 'we produce a lot of other things'. The appellant further argued that nothing was said about the other things produced by the respondents apart from the Snowman Marker. B

The appellant referred further to the first ground of appeal wherein it was submitted that there were sufficient facts to show or to infer that the six machines were used in the commission of the offence. That was the only one inference that can be drawn therefrom. C

Photographs marked as exhibits were admitted to by the respondents. This court hastens to add here that the still photographs failed to show that the machines were operational at the time those photographs were taken. Perhaps since the respondents were alleged to have committed the offence at 5.35 pm, the timing may be the reason for that. This factor was not however addressed in the court. D

It was submitted also that although it was not stated in the statement of facts that the machines were used, the fact and that it was never denied that the machines were not used, the learned DPP urged the court to draw the necessary inference . E

The learned DPP also put forward the case of *Ng Song Luak v PP* [1985] 1 MLJ 456 to support his argument to move the court to accept his contention that in a case where the accused pleaded guilty, the court can consider the facts admitted by the accused apart from the statement of facts. In the said case it was clear from the recorded facts that both the dates and facts of the case did not support the charge. It was admitted by the prosecutor that the charge was defective. F

Yusoff Mohamed J (as he was then) held that there were too many unsatisfactory features in this case which, if allowed uncorrected, would have caused injustice to the appellant, and a new trial was ordered to be conducted by a different magistrate. G

In view of the obvious factual errors and the reason given by the learned Yusoff Mohamed J (as he was then) this court regrets that it is unable to accept the above case as an authority for the above-mentioned proposition by the learned DPP. H

Finally, the learned DPP urged the court that a distinction should be drawn between a case where an accused has pleaded guilty and to a case where the statement of facts are agreed.

Hence, the appellant urged the court to set aside the order of release of machinery and substitute it with an order of forfeiture. I

A *Respondent's case*

Learned counsel for the respondent, Mr RK Menon said that from the charge it is obvious that the writing found on the Snowman Marker — 'Made in Japan' — are the offending words.

Section 3(1)(a) of the TDA says that any person who, in the course of
B trade or business applies a false trade description to any goods shall be guilty of an offence.

Section 18(1) of the TDA says 'any person, other than a body corporate, but including a director, manager, secretary or other similar officer of a body corporate, guilty of an offence under this Act or regulations
C made thereunder for which no other penalty is specified shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or both and, for a second or subsequent offence, to a fine not exceeding two hundred thousand ringgit or to imprisonment for a term not exceeding six years or to both.

D Section 32(1) of the TDA provides as follows:

> All goods seized in exercise of any power conferred under this Act *shall be liable to forfeiture.* (Emphasis added.)

It was the view of learned counsel that, here it means that the goods can be
E forfeited or can be released to the owner.

It was submitted that two ingredients in s 32(2) of the TDA must be there to empower the court to order forfeiture and these are :

(1) that it is proved to the satisfaction of the court that an offence under the Act has been committed; and

F (2) that the goods were the subject matter of or were used in the commission of the offence.

If these two ingredients are present, then it would be mandatory for the court to forfeit. It was added further that the word 'and' appearing there meant that it is not disjunctive.

G It was submitted further that the prosecution must prove their case beyond reasonable doubt even if the accused pleads guilty. This, learned counsel suggested, must be done by the prosecution by giving the facts of the case.

In *Ng Song Luak v PP*, learned counsel argued that in this case the
H accused pleaded guilty and was sentenced and ordered to be whipped.

Facts were given and admitted and on appeal it was pointed out that the facts admitted were not the same as the facts in the charge. The appeal was allowed and a retrial was ordered. Hence it was argued that facts given must be used.

I Learned counsel highlighted a case where the accused admitted that the exhibits tendered by the prosecution were used in the commission of the

offence, the court could order their forfeiture; see *Tan Khing Hung v PP* [1996] 4 MLJ 316. He further drew the attention of this court to the provisions under s 127(1) of the Customs Act 1967 and s 15(1)(b) of the Fisheries Act 1985 to the provisions of s 32(2) of the Trade Descriptions Act. It was therefore his submission that it is imperative for the prosecution to prove that the goods they want forfeited were used in the commission of the offence or were the subject matter of the offence.

He provided the following list of authorities:

(a) *Yap Yoon Lin v R* [1954] MLJ 59.

(b) *R v Wong Ki Chin* [1955] MLJ 39.

(c) *R v Ng Hee Weng & Ors* [1956] MLJ 85.

(d) *PP v Lee Wye Kheng* [1978] 1 MLJ 38.

(e) *PP v Kedah & Perlis Ferry Service Sdn Bhd* [1978] 2 MLJ 221.

(f) *PP v Mat Nawi bin Ismail* [1987] 2 MLJ 366.

(g) *PP v Lau Siew Nguong & Anor* [1994] 2 MLJ 91.

(h) *PP v Ismail bin Yusof* [1979] 2 MLJ 119.

Learned counsel for the respondents argued that the statement of facts at P1 failed to show that the six machines were used in the commission of the offence. The only offence if any, argued learned counsel, was the words 'Made in Japan' on the marker pen. There was nothing in the statement of facts to show that the six machines were used. The making or the manufacture of Snowman Marker is not an offence, argued learned counsel; 'Made in Japan' is. It is not known either, if the machines were used to produce the offending words; at least, this was not proven. Nowhere was there anything to say that the machines were used.

In the statement of facts given, there is nothing to show that the words 'Made in Japan' were embossed onto the Snowman Marker!

Appeal record

Learned counsel went through the appeal record.

(i) Page 7 would show that the accused persons were not represented by counsel when they pleaded guilty to the charge and when they agreed to the statement of facts of the case.

(ii) The statement of the prosecutor at p 8 when he said thus: 'Semua enam mesin digunakan untuk buat pen-pen ini' has no evidential value as this was a statement from the Bar.

(iii) The facts of the case as of 24 April 1997 and on 30 April 1997 remained the same as seen at p 8 of the appeal record.

(iv) Pages 9–10 appeal record — mitigation at para F p 10 states: 'In facts not stated goods were used in commission of offence or subject matter of offence.'

(v) Page 11 appeal record — the prosecuting officer failed to respond to the argument of learned counsel for the appellant outlined at (iv) above.

(vi) Page 12 appeal record — para D of the grounds of judgment specifically said that 'Both the accused pleaded guilty and admitted the facts as outlined in exh P1. Accordingly, they were convicted and fined RM10,000 each'.

(vii) Page 13 appeal record.

The learned sessions court judge indicated at para A thereof that exhs P3 and P4 be forfeited and which exhibits were to be returned to the owner. Here the machines; exhs P3(a) to (f) were ordered to be returned.

(viii) Paragraph B of p 13 confirmed that s 32 of the Trade Descriptions Act was considered by the learned sessions court judge. Learned counsel for the respondents emphasized the words '... an order for the forfeiture of goods shall be made *if it is proved to the satisfaction of the court* ...'. (Emphasis added.)

(ix) The last para of p 13 of the appeal record shows in no uncertain terms that the learned sessions court judge's attention was drawn to the fact that there was no evidence to show that the machines were used in the commission of the offence.

(x) Page 14 — appeal record

The learned sessions court judge agreed to the counsel's submission. Hence the machines were ordered to be returned to the owner.

(xi) Page 15 — para 3 reads as follows:

> Setibanya di premis tersebut, pengadu telah berjumpa dengan dua orang lelaki cina yang bernama Ho Jin Bong No K/P S2112638A dan Cheng Meng Min No K/P S0117711G yang mengaku sebagai tuanpunya perniagaan tersebut. Pengadu telah memperkenalkan diri dan menjelaskan maksud kedatangannya. Premis tersebut adalah merupakan sebuah kilang membuat pelbagai jenis marker pen.

Learned counsel said that there is nothing in this paragraph to show that the marker pens were made in the premises. It was his submission that we cannot presume that they were manufactured there and suggested that the court cannot draw inference as they were not admitted at all. There was nothing in the statement of facts to show that the machines were used in the manufacture of the 250,000 marker pens.

(xii) Paragraph 4 of p 15 reads:

> Di dalam pemeriksaan yang dijalankan aduan telah mendapati bahawa premis tersebut telah menggunakan suatu perihal dagangan palsu iaitu 'Made in Japan' ke atas 250,000 unit marker pen jenama Snowman Marker yang terdiri dari pelbagai warna. Aduan telah menjelaskan kesalahan yang dilakukan kepada kedua-dua defendan tersebut.

It was submitted that para 4 is an allegation by the complainant that the premise used (menggunakan) false trade mark 'Made in Japan'. Neither was there any reference made to the machines nor was there any allegation of facts that the machines were in operation. The prosecuting officer did not say that the machines were used to put the offending trade mark on the pen.

Charge

Learned counsel for the respondent also argued that the wording of the charge appears to indicate that the operative word is 'menggunakan', ie 'to use' or 'using' 'suatu perihal dagangan palsu'. This means 'using a false trade description': the wording of s 3(1)(a) of the TDA. The court enquired if there was any cross-appeal and the response was negative and as such this point was thereafter not considered. Consequently, the 10 cases submitted by learned counsel for the respondent after the trial were not considered either as all of them pertained to or were connected with charges and/or the framing thereof.

The learned trial judge's judgment

In her judgment the learned sessions court judge said both accused pleaded guilty and admitted the facts as outlined in exh P1. Accordingly, they were convicted and fined RM10,000 each.

Exhibits P3(a) to (f) ('machines') were be returned to the owner as the learned sessions court judge agreed entirely that the prosecution did not state in their written statement of facts that the machines were used in the commission of the offence.

The Law

The TDA 1972 is an Act to consolidate and amend the laws relating to merchandise marks with new provisions prohibiting misdescription of goods provided in the course of trade and false or misleading indications as to the price of goods; to confer power to assign the meaning of any expression or indication used in relation to the prices of goods, charges or rates for services, accommodation or facilities and to regulate, control or prohibit the use thereof in the course of trade or business; to prohibit the making of false or misleading statements as to any services, accommodation or facilities provided in the course of a trade or business; to confer power to require information or instructions relating to goods to be marked on or to accompany the goods or to be included in advertisements; and for related purposes.

Section 32 confers power of forfeiture of goods.

An order of forfeiture of goods shall be made if it is proved to the satisfaction of the court that :

(a) an offence under the Act has been committed; and

(b) the goods were the subject matter of or were used in the commission of the offence.

A The first prong is obvious and needs no elaboration. The second prong requires further scrutiny.

Were the goods used in the commission of the offence?

'Goods' as defined by the TDA includes ships, aircraft, vehicles, animals,
B plants and growing crops and all kinds of movable property. Therefore the six machines referred to in this case come under this definition.

In order to determine if the goods were used in the commission of the offence we have to fall back on what is available before the court. There was no full trial.

C The two respondents were charged and they pleaded guilty. The statement of facts (P1) was accepted as correct. They were found guilty and convicted.

If we pause here for a moment, we would note that the following steps have been taken. This is from the notes of evidence at p 7 of appeal record:

D (a) the charge was read and explained and understood by the accused: pleaded guilty and understood the nature and consequences of the plea;

(b) Statement of facts of the case — P1.

(c) P1 admitted as correct.

E (d) P1 and exhibits admitted as correct.

(e) Court found them guilty and thereupon convicted them.

It is obvious therefore that the court found them guilty and convicted them on the strength of their plea and their admission to the statement of facts — P1.

F Looking at the statement of facts — P1 — we have to see if there is anything there to suggest that the six machines were used in the commission of the offence.

Both learned counsel quoted para 3 of P 1. Regretfully nothing is said about the machines being used in the commission of the offence. In this
G respect para 4 is no different. Paragraph 5 talks about confiscation or seizure of those goods mentioned therein. The learned DPP however conceded and admitted that in the statement of facts there was nothing to show that the machines were used in the commission of the offence.

It was argued that since it was not shown that the machines were used
H in the commission of the offence, then inference and circumstantial evidence be used.

On circumstantial evidence, all that is needed to be said is that it has no application in a case where there is an admission to the statement of facts. Further, there was no full trial at the lower court. The case of *Kartar Singh v R* has no application here as, to use the expression of Murray-Aynsley CJ,
I at p 86 in circumstantial evidence it 'must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all'.

This court is also unable to accept the contention that the case of *Eng Song Hai v PP* is the authority for suggesting that where the accused pleads guilty to a charge, the facts should include other facts in the notes of proceeding as it is quite obvious that in the said case the original charge against the appellant was amended to conform with the report of the chemist and it was not necessary for the magistrate to have evidence that the then s 427(1) CPC had been complied with.

On inference, Spencer Wilkinson J said in *Tai Chai Keh v PP* [1948–49] MLJ Supp 105 at p 108 (CA): 'Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.' This is self explanatory and requires no further elaboration.

Therefore, regretfully, the argument on inference cannot be used here. Furthermore, what needs to be highlighted is the fact that it was nowhere disputed that the manufacture or the production of Snowman Marker was illegal or constitutes an offence. The offending words were 'Made in Japan', but in the statement of facts there is nothing to show that the six machines were used to make those offending words. It is trite law that there must be evidence on record. In fact it was never shown to this court that the offending words were embossed or printed onto the Snowman Marker using the six machines.

It is the view of this court that where there is a statement of the facts agreed to by the accused and his conviction was founded on such statement of facts, then, he is only bound by what he has agreed to, ie within the confines of 'the four corners' of the said statement of facts. Nothing more and nothing less. To do otherwise would cause injustice.

Proved to the satisfaction of the court

The other essential ingredient to be considered before an order of forfeiture is to be made is that it must be proved 'to the satisfaction of the court' that an offence has been committed and the goods were used in the commission of the offence.

This court needs to examine if this matter was ever considered by the court below. The last paragraph of p 13 of the appeal record says:

> Counsel for the first and second accused, Mr RK Menon submitted that in the present case, forfeiture was not mandatory as the machines were not the subject matter of the offence, and neither was there any evidence to show that the machines were used in the commission of the offence. He pointed out that the prosecution did not state in their written statement of facts that the aforesaid machines were used in the commission of the offence. With this submission I entirely agreed. Hence the machines were ordered to be returned to the owner.

The above suggests that the learned sessions court judge has considered the matter and has made a finding of facts.

> ... It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be

A disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy.

B (Per Lord Porter in *Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor* [1942] 1 All ER 142 at p 167 (HL), cited by Mohamed Dzaiddin FCJ in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 at p 527 (FC).)

C In a Federal Court Criminal Appeal case of *PP v Wan Razali Kassim* [1970] 2 MLJ 79 at p 82, Azmi LP said: '... An appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility.'

D Similarly in *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175, Federal Court by majority decision, where Gill FJ said at p 179: 'To sum up on the question of liability, it would seem clear that the judgment appealed from was based almost entirely on findings of fact and it is not open to this court to set aside such findings of fact.'

E There is a paucity of authority on forfeiture of goods under the Trade Description Act 1972. The Federal Court in *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 did consider forfeiture under Customs Act 1967, by way of an obiter. Abdul Hamid FJ (as he was then) said at p 251: '*If the court is satisfied* after considering the whole of the materials before it that an offence against the Act has been committed and that the goods were the subject matter or the vehicle was F used in the commission of such an offence, *then, in that event, and not otherwise*, it is mandatory for the court to make an order for forfeiture. (Emphasis added.)

It is clear therefore that before an order of forfeiture is made the court must be satisfied that the goods were the subject matter or were used in the G commission of the offence and not otherwise. The learned sessions court judge had made her findings of facts when she ordered the forfeiture of exhs P3 and P4 and ordered that the machines exhs P3(a)–(f) be returned to the respondents.

Having considered the submissions made by learned counsel and analysing all the authorities offered, there is no sufficient material before H this court to enable it to reject the findings arrived at by the trial judge. There is no evidence before this court to show that the six machines were in fact used to make and/or to produce the offending words 'Made in Japan'. The said machines could not therefore be said to have been used in the commission of the offence.

I On the material before this court, it is clear that the learned sessions court judge did not err in principle in any way and as such there is no basis for this court to interfere with her decision.

In view of the compelling authorities hereinbefore outlined, the decision of the learned sessions court judge in imposing a fine of RM10,000 each on the respondents and the order of forfeiture of 250,000 units of Snowman Marker of assorted colours, 1,000 units of 'Kotak Pembungkus', 30 units of 'Ink Percetakan' and 10 units of 'bahan mentah jenama Polypropylene' is hereby confirmed. This court further holds that the order to return the six machines to the respondents is, in the circumstances, correct.

This appeal is therefore dismissed.

Appeal dismissed.

Reported by Lynette Tan Ping